Commission on Structural Alternatives for the Federal Courts of Appeals

Statement of Michael Traynor and Joseph P. Russoniello

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California Should Neither Be Divided Nor Isolated

Each of us is a California lawyer and a member of the Ninth Circuit bar and practices law in a firm that has offices in Northern California and Southern California.(1) Each of us has opposed recent proposals to split the Ninth Circuit.(2) Given the obvious fact that "splitting a circuit does not do anything to alleviate workload"(3) and the sometimes not so transparent fact that the proponents of splitting have agendas other than alleviating workload,(4) the burden of persuasion should be a heavy one that structural change will produce functional improvement.

Our focus today is on two particularly unsatisfactory proposals for splitting the Ninth Circuit that arise from California's position as the producer of much of the court's workload, *first*, dividing California between two circuits,(5) *second*, isolating California from other states. (6) If Congress restructured the Ninth Circuit by dividing California or by isolating it, clients and lawyers and the public would be disadvantaged. They would enjoy no demonstrable countervailing advantage.

California Should Not Be Divided Between two Circuits

If California were divided between two circuits, conflicts in actual cases could occur and additional uncertainty about the applicable law unquestionably would occur. A few recent cases decided by the Ninth Circuit help illustrate the point. In each, opinions on the court were divided, or the court and the district court (or even the two of us) viewed the case differently, or a ruling either way would have been defensible. Had the issues - of great impact on Californians - been litigated at two different courts of appeal, with different outcomes, and had not one court spoken with one authoritative voice, serious conflict and uncertainty would have resulted.

Regardless of how one feels about the actual result, imagine the consequences of a different outcome in two separate circuits in the Proposition 209 litigation that challenged the constitutionality of an initiative that prohibited race and gender preferences.(7) For a statewide University of California, or state university system, or other agencies, such preferences would have been upheld in some parts of the state and struck down in others, a result that would destroy any attempt to achieve coherent system-wide planning. Similar conflicts would occur if litigation challenging the constitutionality of an initiative restricting the rights of illegal aliens (Proposition 187) led to different outcomes in two circuit courts that affected a single otherwise unified state.(8)

Examples abound. Suppose in an era when arbitration is increasingly used, two circuit courts produce opposing rules for California-based contracts on the question whether an arbitration clause can provide a standard of judicial review more rigorous than the deferential standard of review under the Federal Arbitration Act.(9) Or suppose a state employer's requirement of an independent medical examination is challenged - with different outcomes - under the Americans with Disabilities Act and the Fourth Amendment.(10) The conduct of lawyers could be affected by conflicting rulings, for example, in one court that a state statute prohibiting a lawyer from engaging in "offensive personality" is unconstitutionally

vague and in the other that such a statute satisfies due process at least as applied.(11) Similarly, why should California clients, lawyers, and citizens be forced to accept different rulings from different circuits on such matters as the effect of a reservation of right to a federal hearing on federal constitutional challenges to regulatory decisions, (12) or the effect of juror bias on habeas corpus review in death penalty cases (13) , or the standing of a political subdivision to challenge the constitutionality of a state statute(14) , or in any of the many areas in which conflicts can occur? These areas include California law issues in diversity jurisdiction and supplemental jurisdiction actions, cases in which the interpretation of California law is intertwined with federal questions, prisoner litigation, the validity of California statutes and regulations(15) , issues involving environmental laws and natural resources that recognize no arbitrary boundaries(16) , and the subtle issues involving the interaction of California law and federal procedure and the *Erie* doctrine.(17)

We do not wish to exaggerate or belittle the likelihood of actual conflict. It may be that actual irreconcilable conflicts will not arise with great frequency. Given the human potential for new controversies that fill the courts, however, conflicts are inevitable and not easily measured. When conflicts arise, perhaps they may be ameliorated in a modest way via California's new rule of court governing certification of a question to the Supreme Court of California (18) or intercircuit devices such as an *en banc* panel formed by judges from two circuits, (19) but such procedures are extraordinary and limited. Apart from actual conflicts and their amelioration, however, there is no doubt in our minds that in the law as practiced in thousands of individual consultations, transactions, and litigated cases, having two independent circuits issuing rulings affecting one state will aggravate uncertainty, unpredictability, and complexity. (20)

Before Californians are burdened with a system that is unique to them and is without precedent in any other circuit, a substantial showing should be made that significant improvements in function will result from a change in structure. The proponents of splitting cannot make this showing. The cases and issues will still exist. Moreover, the intracircuit procedures the Ninth Circuit has established for avoiding and addressing conflicts will not be so easily administered in two circuits as in one. Furthermore, a system that produces not only thousands of opinions a year but also conflicting or different decisions affecting one state is, to invoke Justice Breyer's words, "a system which may work to the advantage of those with resources sufficient to take advantage of the situation." (21)

There is enough uncertainty, unpredictability, and complexity already given the potential for different results in the district courts, the intermediate state appellate courts in California, and the federal circuits. California lawyers and citizens already have plenty to absorb and reconcile. It would be intolerable to single them out and force on them another layer of difficulty that no one else in the country must endure.

California Should Not Be Isolated

If California cannot be divided effectively, should it be isolated in a California-only circuit? Doing so would tend to make it more a California court with a parochial outlook and less a federal court with a national outlook. It would diminish the diversity inherent in our federal system where the wisdom and experience of judges from different states is customarily brought to bear on different issues. (22) It could tend to be powerfully affected by one long term California senator who insisted on influencing judicial nominations in ways that are not usually politically feasible when several states are joined in one circuit. (23) It would violate the principles articulated by the Hruska Commission that "where practicable, circuits should be composed of at least three states; in any event no one-state circuits should be created," (24) and that "Except for the most compelling reasons, we are reluctant to disturb institutions which have acquired not only the respect but also the loyalty of their constituents." (25)

Conclusion

There is no good reason to split the Ninth Circuit and no good way to do so. Two particularly bad ways are to divide California or to isolate it. Neither would produce any demonstrable advantage. Each would seriously disadvantage California and its citizens. Attention should focus instead on filling judicial vacancies so that the court has a full team to get on with its job.

Respectfully submitted.

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1. 1 Michael Traynor and Joseph P. Russoniello are partners in the San Francisco office of Cooley Godward LLP. Mr. Russoniello served as United States Attorney for the Northern District of California from 1982 to 1990.

2. 2 Both authors served as members of an ad hoc committee that opposed the 1997 rider to an appropriations bill that would have split the Ninth Circuit and both supported a study instead. In 1990, Mr. Traynor testified on behalf of six national environmental organizations in opposition to S.948, the Ninth Circuit Court of Appeals Reorganization Act of 1989, Hearing before the Subcommittee on Courts and Administrative Practice of the Committee on the Judiciary, U.S. Senate, S. Hrg. 101-829, pp. 509-539 (Mar. 6, 1990); and as president-elect of the Bar Association of San Francisco in 1972 helped lead that Association's opposition to a proposal to divide the Ninth Circuit by dividing California.

3. 3 Thomas E. Baker, *2020 Year-End Report on the Judiciary by the Chief Justice of the United States*, 24 Pepp.L.Rev. 861, 884 (1997).

4. 4 *See* Testimony of Governor Pete Wilson in 1990 at S.Hrg. 101-829, *supra* n.2 at 284 ("environmental gerrymandering"); Testimony of Michael Traynor, *id.* at 519 ("it is appropriate to ask whether this proposed reapportionment of the Ninth Circuit is simply the unwelcome cousin of the political gerrymandering of legislative districts); Testimony of John P. Frank before the current Commission on May 29, 1998.

5. 5 *See* Commission on Revision of the Federal Court Appellate System, *The Geographical Boundaries of the Several Judicial Circuits: Recommendations for Change*, 62 F.R.D. 223, 234-242 (1973)(the "Hruska" Report); Diarmuid O'Scannlain, *A Ninth Circuit Split is Inevitable, but not Imminent*, 56 Ohio St. L.J. 947, 949 (1995).

6. 6 For criticism of such a "horsecollar" configuration in which the other eight states and two territories would surround California like a horsecollar, *see* O'Scannlain, *supra* n.5, 56 Ohio St. L.J. at 949; Hruska Report, *supra* n.5, 62 F.R.D. at 237.

7. 7 *See Coalition for Economic Equity v. Wilson*, 122 F.3d 692 (9th Cir.), *cert. denied*, _____U.S. ____, 139 L.Ed.2d 310 (1997).

8. 8 *See League of United Latin American Citizens v. Wilson*, 131 F.3d 1297 (9th Cir. 1997)(affirming denial of intervention).

9. 9 *See Lapine Technology Corp. v. Kyocera Corp.*, 130 F3d 884 (9th Cir. 1997).

10. 10 *See Yin v. State of California*, 95 F.3d 864 (9th Cir. 1996), *cert. denied*, ___ U.S. ___, 117 L.Ed.2d 842 (1997).

11. 11 *See United States v. Wunsch*, 84 F.3d 1110 (9th Cir. 1996).

12. 12 *See United Parcel Service v. California Public Utilities Commission*, 77 F.3d 1178 (9th Cir. 1996).

13. 13 *See Dyer v. Calderon*, 122 F3d 720 (9th Cir. 1997).

14. 14 *See Burbank-Glendale-Pasadena Airport Authority v. City of Burbank*, 136 F.3d 1360 (9th Cir. 1998).

15. 15 *See* Arthur D. Hellman, *Legal Problems of Dividing a State Between Federal Judicial Circuits*, 122 U.Pa.L.Rev. 1188 (1974). The Hruska "Commission's recommendation that Congress split California and reassign its district courts to different circuits was not foreseen and proved very controversial." Carl Tobias, *Suggestions for Studying the Federal Appellate System*, 49 Fla. L. Rev. 189, 194 (1997); Carl Tobias, *Why Congress Should Not Split the Ninth Circuit*, 50 SMU L.Rev. 583, 585 (1997). See also the argument for an expanded circuit bench in William L. Reynolds & William M. Richman, *Studying Deck Chairs on the Titanic*, 81 Cornell L.Rev. 1290 (1996).

16. 16 *See* Testimony of Michael Traynor, *supra* n.2.

17. 17 *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 91938); *Klaxon Co. v Stentor Electric Mfg. Co.*, 313 U.S. 487 (1941); *Van Dusen v. Barrack*, 376 U.S. 612 (1964); *Gasperini v. Center for Humanities. Inc.*, 518 U.S. 415 (1996).

18. 18 California Rule of Court 29.5, effective January 1, 1998.

19. 19 *See* O'Scannlain, *supra* n.5, 56 Ohio St. L. J. at 150 discussing H.R. 3654, 103rd Cong., 2st Sess. (1993) proposed by Representative Michael J. Kopetski of Oregon.

20. 20 Chief Judge Hug states that "Lawyers have expressed particular concern that dividing the extended coastline in the West would create inconsistent and conflicting application of maritime, commercial, and utility law in the two circuits, making commerce more difficult and costly, and requiring litigants and judges to research the law of two circuits for every potential cross-circuit transaction." Proctor Hug, *The Ninth Circuit Should Not Be Split*, 57 Mont. L.Rev. 291, 298 (1996). This statement applies with comparable force to a division of California between two circuits. For analysis of intercircuit conflicts, *see* Arthur D. Hellman, *By Precedent Unbound: The Nature and Extent of Unresolved Intercircuit Conflicts*, 56 U.Pitt.L.Rev. 693 (1995).

21. 21 Stephen Breyer, *Administering Justice in the First Circuit*, 24 Suffolk U. L. Rev. 29, 40 (1990).

22. 22 *See* Hruska Report, *supra* n.5, 62 F.R.D. at 237; O'Scannlain, *supra* n. 5, 56 Ohio St.L.J. at 949 ("creating a circuit exclusively for one state might tend to undermine the system of federalism envisioned by the founding fathers").

23. 23 *See* Hruska Report, *supra* n.5, 62 F.R.D. at 237; Carl Tobias, *Why Congress Should Not Split the Ninth Circuit*, 50 SMU L.Rev. 583, 598 (1997).

24. 24 *See* Hruska Report, *supra* n.5, 62 F.R.D. at 231-232.

25. 25 *Id.*, 62 F.R.D. at 228. *See* Arthur D. Hellman, *Dividing the Ninth Circuit: An Idea Whose Time Has Not Yet Come*, 57 Mont.L.Rev. 261, 266 (1996).